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IN THE
COURT OF APPEALS OF INDIANA

JERRY W. LOCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 17A03-0604-CR-181
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Kevin P. Wallace, Judge
Cause No. 17D01-0506-FD-68

January 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jerry Lock ("Lock") appeals his conviction after a bench trial for neglect of a dependent child, as a class D felony.

We affirm.

ISSUE

Whether sufficient evidence supports the trial court's specific finding that Lock knowingly, intelligently and voluntarily waived his right to a trial by jury.

FACTS

On the afternoon of May 30, 2005, Lock drove with his sixteen-month-old son, L.L., to the home of his friends, Larry and Jeannie Delozier ("Deloziers"). Before leaving his home, Lock consumed alcohol and ingested seven prescribed medications – specifically, anti-psychotic narcotics and muscle relaxants. When Lock arrived at the Deloziers' residence, the homeowners and their guest, Jamie Foster ("Foster"), observed that Lock was intoxicated.

Lock placed L.L. into a toddler swing on the Deloziers' property, neglecting to engage the child safety guard. Before Foster entered the Deloziers' home, she observed Lock pushing L.L. in the swing. She reemerged from the home to see Lock "passed out in the yard, laying [sic] in front of the swing." (Tr. 59). L.L had fallen asleep and was leaning forward in the swing. Foster removed L.L. from the swing, carried him indoors and fed him. Later, Foster returned outdoors with L.L. to allow the child to play.

Lock jerked awake and called for L.L, who ran to his father's side. Lock picked L.L. up by the back collar of his shirt, and "literally, [his] feet were off the ground." (Tr.

63). According to Foster, L.L. "[l]ooked like he was . . . pedaling a bicycle . . . . His feet were going in circular motions" and "[h]e was crying." (Tr. 64). Lock carried L.L. in this fashion to the camper that Lock's older son maintained on the Deloziers' property, with the intention that Lock and L.L. would "take a nap" inside. (Tr. 125). Lock and L.L. remained in the camper for about two hours.

Nervous about the camper's faulty door latch and the camper's proximity to the Deloziers' pond, Foster checked on L.L. repeatedly. On her last visit, she observed Lock asleep and L.L. playing on the floor with a spilled bag of chewing tobacco. Foster removed L.L. from the camper and took him into the Deloziers' home. Once inside, Foster observed lacerations and contusions on L.L.'s face and neck, likely resulting from L.L.'s shirt rubbing against his skin as Lock had carried him. Foster showed the wounds to the Deloziers, who alerted the authorities.

Lock was arrested and charged with battery against a person less than thirteen years of age resulting in bodily injury, as a class D felony. Lock was advised of his constitutional rights at his initial hearing, including his right to trial by jury. On June 3, 2005, Lock filed his demand for jury trial. (Appellant's App. 16).

On February 3, 2006, the State and Lock, by counsel, advised the trial court that they had reached a plea agreement. The parties contemplated an arrangement whereby the State would amend the charge against Lock to neglect of a dependent, as a class D felony. (Appellant's App. 22). Pursuant to the terms of the plea agreement, the State agreed to "dismiss the probation violation and refrain from filing an habitual enhancement." (Tr. 26). The trial court ensured that Lock understood the terms of the

plea agreement. In addition, the trial court advised Lock of his right to trial by jury, and confirmed his understanding that entering a guilty plea constituted waiver of the right. Again, Lock acknowledged his understanding to the trial court. However, unable to find a factual basis for Lock's guilty plea, the trial court rejected the parties' proposed plea agreement.

On February 17, 2006, Lock, by counsel, filed a waiver of jury trial, executed by both Lock and his counsel. Lock requested that his jury trial be vacated and that a bench trial be slated. On March 2, 2006, before hearing evidence, the trial court determined on the record that Lock's waiver was made knowingly, intelligently and voluntarily. Subsequently, Lock was convicted of neglect of a dependent and sentenced to a two-year term of imprisonment in the Department of Correction, from which he now appeals.

DECISION

Lock complains that there is insufficient evidence to support the trial court's finding that his waiver of his right to trial by jury was made knowingly, intelligently and voluntarily. In a tortured manner and without specific evidence, Lock argues that the State's promise to dismiss the probation violation and to refrain from filing the habitual enhancement had a coercive effect on his decision to waive jury trial. He argues, further, that the trial "court's investigation into the promises that induced [Lock's] waiver was insufficient." (Appellant's Br. 12). We are not persuaded.

The United States and Indiana Constitutions guarantee the right to trial by jury. *Anderson v. State*, 833 N.E.2d 119, 122 (Ind. Ct. App. 2005) (citing *Poore v. State*, 681 N.E.2d 204, 206 (Ind. 1997)). A person charged with a felony has an automatic right to a

jury trial. *Id*. A defendant is presumed not to waive this right unless he affirmatively acts to do so. *Id.*

To constitute a valid waiver of the right to a jury trial, the defendant's waiver must be knowingly, intelligently and voluntarily made with sufficient awareness of the relevant circumstances surrounding its entry and consequences. *O'Connor v. State*, 796 N.E.2d 1230, 1233 (Ind. Ct. App. 2003). The defendant must express his personal desire to waive a jury trial in a manner that is apparent from the court's record, whether in the form of a written waiver or a colloquy in open court. *Id.* at 1234. The defendant must communicate his clear understanding that by waiving his right to trial by jury, he intends to proceed with a bench trial.

> … Indiana Code Section 35-37-1-2 (2004) dictates that a knowing, voluntary, and intelligent waiver of the right to a jury trial requires assent to a bench trial by defendant personally, reflected in the record before the trial begins either in writing or in open court. The record reflection must be direct and not merely implied. It must show the personal communication of the defendant that he chooses to relinquish the right.

Kellems v. State, 849 N.E.2d 1110, 1113 (Ind. 2006) (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)).

One such personal demonstration of a defendant's choice to relinquish his right to jury trial is his filing of a signed waiver with the trial court. A defendant's filing of a signed jury trial waiver adequately reflects a personal desire to waive this right and constitutes the affirmative act necessary to do so for a felony charge. *Poore*, 681 N.E. 2d at 207.

Turning to the instant case, we find that Lock affirmatively waived his right to trial by jury in a knowing, intelligent and voluntary manner, as evidenced by the trial

record. Before Lock's trial began, Lock and his counsel assented in writing and orally moved in open court for a bench trial. Both acts revealed that Lock and his counsel had consulted and agreed, further indicating Lock's voluntary decision to relinquish his right to trial by jury.

The trial court unambiguously advised Lock of his right to trial by jury at his initial hearing and again during his unsuccessful guilty plea hearing on February 3, 2006. At the latter proceeding, before considering Lock's offer to plead guilty, the Court engaged in the following colloquy with Lock:

> [Court]: I advise you that you have the right to have a trial and to have that trial be public, speedy and by a jury. Do you understand these rights?
>
> [Lock]: Yes, sir.
>
> [Court]: You have the right to face all witnesses against you and to see, hear, question and cross examine these witnesses. Do you understand this?
>
> [Lock]: Yes, sir.
>
> [Court]: You have the right to require witnesses to be present at any hearing or trial and testify on your behalf, and the Court will help you by issuing orders to such witnesses to come to court and testify. Do you understand this?
>
> [Lock]: Yes, sir.
>
> [Court]: The State of Indiana must prove beyond a reasonable doubt that you committed the offense charged against you before you can be found guilty. … do you understand that?
>
> [Lock]: Yes, sir.
>
> [Court]: You cannot be forced to make any statement or testify against yourself at any hearing or trial. You have the right to remain silent. Do you understand this?
>
> [Lock]: Yes, sir.

> [Court]: Do you understand that by pleading guilty you give up all the rights I've just explained?
>
> [Lock]: Yes, sir.

(Tr. 26, 27). Afterwards, the trial court questioned Lock, found an insufficient factual basis for his plea, and rejected the proposed plea agreement.

Immediately following the rejection of the plea agreement, Lock and his counsel both assented to a bench trial in open court. Lock's counsel informed the court of its anticipated witnesses, and indicated his willingness to proceed with a bench trial. Similarly, Lock indicated his willingness to proceed during the following exchange with the trial court:

> [Court]: …[S]o State versus [Lock] is now a first setting for March 2nd at 8:30 A.M. Uh, [Lock] of course you need to be back here for your trial. If you fail to appear then I'll issue a warrant for your arrest and we'll have the trial in your absence. And you'll lose the opportunity to have input into the trial. … Mr. Lock, I, you may be confused about what's happening here.
>
> [Lock]: Yes, I am.
>
> [Court]: Uh, you attempted to plead guilty. But I don't find that there's a factual basis, based on your plea, based on your evidence to accept your plea of guilty, so I am not accepting your plea of guilty. And we'll have to have a trial on March 2nd.
>
> [Lock]: It was set for March 6th.
>
> [Defense]: No, it was March 2nd.
>
> [Lock]: Oh, was it March 2nd? Oh, I'm sorry. I had wrote (sic) it down wrong.
>
> [Court]: Yeah. I think March 2nd is right. March 2nd . . . at 8:30 A.M. Okay.

(Tr. 42, 43).

Once Lock's guilty plea was rejected and his bench trial scheduled, the agreement contemplated by the parties lacked any effect. Further, on February 17, 2006, two weeks after his guilty plea was rejected, Lock filed with the court an express waiver of jury trial, and he and his counsel signed this waiver.

Lock's newly-executed waiver and the timing thereof support the trial court's finding that jury trial waiver was made knowingly, intelligently and voluntarily. First, the Indiana Supreme Court has held that a defendant's understanding may be inferred when he and his attorney both sign the waiver of jury trial form – specifically, that the defendant acted upon advice and information of legal counsel. *Poore*, 681 N.E.2d at 207. Second, the timing of the filing of the waiver counters Lock's claim that he was coerced into executing the waiver because at the time of the filing, Lock could not reasonably have believed that his agreement with the State would still be accepted.

In addition, two weeks after filing the written waiver of jury trial with the court on March 2, 2006, Lock orally reiterated his desire to waive trial by jury in open court. The following exchange ensued on the trial record:

> [State]: . . . The Defendant agreed to waive a jury trial if I would dismiss the probation violation. If he waives that jury trials [sic] here on the record[,] I will dismiss the probation violation.
>
> [Defense]: Your Honor, we had talked about this previously. And obviously, everybody knew this was happening. But, yes, we had decided to put this on the record here. [Lock], I had filed with the Court a document on February 17th indicating that you wish to waive your right to have a jury trial in this matter. We had discussed this issue before filing that. Do you remember that?
>
> [Lock]: Yes, sir.

> [Defense]: . . . [Y]ou know it's your absolute right to have a jury trial in this matter? Is that correct?
>
> [Lock]: Yes.
>
> [Defense]: But you're willing to give that right up and, and [sic] you want this matter heard by Judge Wallace. Is that correct?
>
> [Lock]: Yeah.
>
> [Court]: Okay. [I will] make a specific finding that Mr. Lock has knowingly and voluntarily waived his right to a jury trial in FD-68. And on that basis, I will show that the State will dismiss the probation violation in CM-589.

(Tr. 47, 48).

We have previously held that a defendant affirmatively waives his right to a jury trial when he signs a written waiver form. *Peete v. State,* 678 N.E.2d 415, 418 (Ind. Ct. App. 1997); *Rodgers v. State*, 415 N.E.2d 57, 58 (Ind. 1981) (standing for the proposition that the right to a jury trial in a felony charge may be waived in writing). In *Rodgers*, as herein, the defendant signed a written waiver of his right to trial by jury and the trial court also engaged in similar discussions about the implications of such a waiver. In *Rodgers*, the Indiana Supreme Court held that the defendant had waived his right to a jury trial in a knowing, intelligent and voluntary manner.

Based on the foregoing, the evidence establishes that Lock filed a signed waiver of jury trial and subsequently, orally reiterated in open court his desire to waive his right to jury trial. Thus, based upon the record, it is clear that Lock knowingly, intelligently and voluntarily waived his right to a trial by jury.

Lock's decision to file his jury trial waiver after the trial court rejected his initial attempt to enter a guilty plea significantly diminishes the weight of his coercion claim.

Lock contends that the State's promise, made during plea negotiations, to dismiss the probation violation and to refrain from filing the habitual enhancement, had a coercive effect on his decision to waive jury trial. Lock further claims error because the trial "court's investigation into the promises that led to [his] waiver in this case was insufficient." (Appellant's Br. 12).

The United States Supreme Court has endorsed the merits of the plea bargaining process, acknowledging its efficacy in the administration of criminal justice. *Moulder v. State*, 289 N.E.2d 522, 526 (Ind. Ct. App. 1972) (citing *Santobello v. New York*, 404 U.S. 257 (1971)).

> [Plea bargaining] is an essential component of the administration of criminal justice. Approximately 80% of all criminal charges are disposed of by resorting to the plea bargaining process. Without it, even a proliferation of additional courts and judges could not adequately fill the vacuum.

Santobello, 404 U.S. at 257. "Properly administered," added Chief Justice Burger of the United States Supreme Court, "it is to be encouraged." *Brady v. United States*, 397 U.S. 742, 751-752 (1970).

The United States Supreme Court has also held that it is not unlawful coercion to use the threat of an habitual enhancement to induce a defendant's acceptance of a plea agreement. *Nash v. State*, 429 N.E.2d 666, 670 (Ind. Ct. App. 1981) (citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)). The Court added, however, that "there must be a legitimate basis for such a charge." *Davis v. State*, 418 N.E.2d 256, 259 (Ind. Ct. App. 1981).

In the instant case, Lock does not assert that the State lacked a legitimate basis for threatening to file an habitual enhancement. His criminal history indicates his eligibility for an habitual enhancement, given his prior felony convictions. By extension, we also find that it is not unlawful coercion to promise to dismiss a pending charge – here, an appropriately charged probation violation – to induce a defendant to accept a plea bargain. We find no coercive quality in either the State's promise to dismiss the probation violation or its decision to refrain from filing a legitimate habitual enhancement. As a matter of fact, Lock received a significant benefit from the State's promise to dismiss the probation violation, which if found to be true, would warrant that any sentence imposed must be served consecutively to the underlying sentence.

Lock also asserts that the trial "court's investigation into the promises that induced [Lock's] waiver was insufficient," citing *Williams*. *Williams v. State*, 307 N.E.2d 880, 885 (Ind. Ct. App. 1974). (Appellant's Br. 12). We find that Lock's heavy reliance on *Williams* in support of this claim is misplaced. *Id*.

In *Williams*, before the trial court accepted the guilty plea, defense counsel repeatedly informed the court that the defendant's waiver of jury trial was induced solely by plea negotiations. After plea negotiations failed, counsel had attempted to withdraw the prior waiver and the trial court refused. This Court held that the trial court abused its discretion because it failed to investigate further upon learning that the waiver was possibly induced by promises stemming from plea negotiations. In such circumstances, we held that the trial court was under an affirmative obligation to investigate into the

nature and extent of the promises that may have induced the waiver, and that its failure to investigate and to permit the withdrawal of the waiver constituted an abuse of discretion.

Under the instant facts, the trial record neither evidences Lock's attempt to withdraw his waiver nor his assertion that his waiver was predicated solely upon his plea agreement with the State. To the contrary, Lock's formal waiver, submitted to the court and executed by both Lock and his counsel, was filed two weeks after the trial court rejected the parties' proposed plea agreement.

We affirm.

NAJAM, J., and FRIEDLANDER, J., concur.